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No. 76-185

In the Supreme Court of the United States

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CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE
FLATHEAD INDIAN RESERVATION, ET AL., PETITIONERS

v.

JAMES M. NAMEN, ET AL., AND THE
CITY OF POLSON, MONTANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The Solicitor General, on behalf of the United States, submits this memorandum in support of the petition for a writ of certiorari.

This case presents the question whether non-Indians who own land abutting navigable waters within an Indian Reservation are entitled, without the Tribe's permission, to erect structures on the adjacent bed and banks, the title to which is held in trust by the United States for the Tribe's benefit.

(1)

Within the Flathead Indian Reservation,¹ Montana, lies the southern half of Flathead Lake, a navigable body of water whose bed and banks are held in trust by the United States for the Confederated Salish and Kootenai Tribes.² Respondents Namen, who are non-Indians, own lakefront land within the Reservation through successive conveyances of portions of an Indian allotment issued in 1908 pursuant to the Act of April 23, 1904, 33 Stat. 302. One respondent, James Namen, operates on the lake a business known as Jim's Marina. He has erected and maintained certain structures that extend beyond the high-water mark of the lake and encroach on its beds and banks, including a breakwater³ built in 1973 over the objections of officials of the Department of the Interior and the Tribes.

On August 6, 1973, the Tribes sued for declaratory and injunctive relief against respondents on the grounds that, as the beneficial owners of the bed and banks of the lake below its high-water mark, the Tribes had the right to control the use of that land, and that respondents were trespassing on tribal land.

The district court granted partial summary judgment against the Tribes, holding that respondents "as owners of land riparian to the south half of Flathead Lake are entitled as a matter of law to access to the

¹ The Reservation was created pursuant to the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975.

² The Tribes are organized pursuant to the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. 461 *et seq.* and have a governing body recognized by the Secretary of the Interior.

³ Among the other structures are docks, wharves, piers and a storage shed (Pet. App. 8a).

lake" and that "[c]onecomitant with the right of access is the right to wharf out to navigable water" (Pet. App. 29a).⁴ The court of appeals affirmed *per curiam* on the basis of the district court's opinion (Pet. App. 1a-3a).

1. The issue is important and warrants review by this Court. The decisions below not only will upset the delicate balance between Indian tribes and non-Indian riparian property owners on reservations in the Ninth Circuit but will doubtless affect such relationships within other reservations. The decisions also implicate the responsibility of the United States, which holds title to the bed and banks of many navigable waters within Indian reservations. Although the issue here is novel and no conflict exists among the courts of appeals, prompt resolution by this Court is important: settled rules should govern the interests of non-Indian property owners and Indian tribes so that legal uncertainty and continuing conflict between the parties can be avoided.

2. The decision imposes an important limitation on the right of Indians to exercise dominion over their reservations.

The district court held that through the Allotment Act of 1904, read in the context of federal common law, Congress conferred riparian rights of wharfage and access on the Indian allottees and their successors. Noting that "the authority of the Federal Government is superior to that of the Tribe" (Pet. App. 21a), the

⁴ The court ordered a further hearing to determine whether any of the structures owned and maintained by respondents "constitute an abuse of their riparian rights" (Pet. App. 29a).

court rejected the argument that tribal law governed ownership, use and control of the bed (Pet. App. 19a-21a). The decision of the district court thus not only conferred certain riparian rights on the non-Indian landowners but also denied to the Tribes the necessary authority to regulate the exercise of those rights. Without that authority the Tribes will have no voice in determining such important matters as the proper dimensions and design of wharves and docks; the number of such structures consistent with safety or preservation of the beauty or ecology of the waters; or the types of other facilities that should be allowed. The only check upon the usage of Flathead Lake by private riparian landowners will be possible review by a federal court to determine whether the landowners have "abused" their riparian rights.

By contrast, a State has broad power to govern the use of beds and banks of navigable waters within its jurisdiction. *Pollard v. Hagan*, 3 How. 212; *Shively v. Bowlby*, 152 U.S. 1; *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387. Whether it acts as proprietor or sovereign, a State may limit private usage of lake beds and banks for the public benefit. *Port of Seattle v. Oregon & W. R.R.*, 255 U.S. 56. Even a federal patent does not confer private rights in those lands committed to state control. *Pollard v. Hagan, supra*; *Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10.

An Indian tribe, acting in its capacity as proprietor and sovereign, should have comparable authority with respect to non-Indian use of the lake beds and banks

that comprise part of the land of the reservation held in trust for the tribe. This Court has recently stated: "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester v. Georgia*, 6 Pet. 515, 557 (1832); they are 'a separate people' possessing 'the power of regulating their internal and social relations . . . ' [citations omitted]," *United States v. Mazurie*, 419 U.S. 544, 557. Yet the decisions below necessarily mean that the Tribes have no control over non-Indian usage of submerged tribal land abutting private land within their reservation. Such intent should not be attributed to Congress without far clearer evidence than exists on the record of this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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